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Supreme Court of the United States

October Term, 1967

No. 968

Supreme Court, U.S.
FILED
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BANCO NACIONAL DE CUBA,

Petitioner,

—against—

F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co.,

Respondents,

—against—

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA and LEHMAN BROTHERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA AND LEHMAN BROTHERS IN OPPOSITION

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January 25, 1968

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Statement of the Case

This case arises out of the remand by this Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964). The Court below (Pet. App. 31-38,* 383 F.2d 166, 168-72 (2d Cir. 1967)) and the District Court (Pet. App. 65-68, J.A. 15a-18a, 243 F. Supp. 957, 960-62 (S.D.N.Y. 1965)) have set forth the facts necessary for an understanding of the issues now presented.** Briefly, in February and July

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* Citations with the prefix "Pet. App." denote references to the judgments and opinions below which are appended to the Petition herein; those with the prefix "J.A." refer to the Joint Appendix in the Court below.

** The facts underlying Petitioner's claim for relief are also set forth in the *Sabbatino* opinions of this Court (376 U.S. at 401-07), the Court of Appeals (307 F.2d 845, 849-52 (2d Cir. 1962)) and the District Court (193 F. Supp. 375, 376-77 (S.D.N.Y. 1961)).

of 1960, Respondent Farr, Whitlock & Co. ("Farr, Whitlock") contracted to purchase a quantity of sugar from a wholly owned subsidiary of Respondent Compania Azucarera Vertientes-Camaguey de Cuba ("C.A.V."), a Cuban corporation virtually all of the stock of which was owned by United States nationals. The sugar was to be loaded on board a ship standing offshore at the Cuban port of Jucaro, with payment to be made in New York upon presentation of a sight draft and shipping documents.

Thereafter, on July 6, 1960, Congress amended the Sugar Act of 1948 to permit a reduction by the President of the sugar quota allotted to Cuba, and the President exercised the granted power. In retaliation, the Cuban government on the next day promulgated Law No. 851 giving the Cuban executive arm discretionary authority to nationalize, "through forced expropriations," the properties or enterprises in which "physical and corporate persons who are nationals of the United States of North America . . . have an interest, even though they be organized under the Cuban laws."*

Between August 6 and August 9, 1960, all the sugar under contract was loaded on board ship. Pursuant to the authority granted by Law No. 851, the Cuban President and Prime Minister promulgated a resolution, dated August 6, 1960, expropriating the property of specifically named enterprises in which "nationals of the United States of North America . . . have a predominating interest . . . ," including C.A.V. and its wholly owned subsidiary.** As a result of this resolution, Farr, Whitlock was

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* The full text of Cuban Law No. 851 is set out in 376 U.S. at 401-02 n. 3.

** The resolution is reprinted at 376 U.S. at 403-05 n. 7.

compelled to enter into contracts virtually identical to those it had made with C.A.V.'s subsidiary, with Banco Para el Commercio Exterior de Cuba ("Banco Exterior"), an instrumentality of the Cuban Government, in order that the ship carrying the sugar might sail. Banco Exterior then assigned the bills of lading to Petitioner, the financial agent of the Cuban Government, and they were subsequently obtained by Farr, Whitlock, which negotiated them and received payment for the sugar. Farr, Whitlock refused to remit the proceeds to Petitioner due to C.A.V.'s claim that the expropriation was ineffective to deprive it of its rights.

Petitioner, basing its claim on the Cuban expropriation, then brought this suit in the Federal District Court for the Southern District of New York to recover the proceeds. Both the District Court (193 F. Supp. 375) and the Court of Appeals (307 F.2d 845) found Petitioner's claim to be without merit, holding that the expropriation in question violated international law. This Court (376 U.S. 398) held the act of state doctrine applicable and reversed and remanded for further proceedings.

With the case still pending on remand in the District Court, Congress enacted § 301(d)(4) of Public Law 88-633, 78 Stat. 1013, 22 U.S.C. § 2370(e)(2) (1964) ("the Amendment") which provides that the act of state doctrine should not be applied in certain specified cases. The District Court (Pet. App. 65, J.A. 15a, 243 F. Supp. 957) found that the Amendment applied to cases pending at the time of its enactment, including the case at bar, that generally, and as applied, the Amendment was clearly constitutional, and that it was bound by the Court of Appeals' prior decision that Cuba's violation of international law rendered its title invalid. The Court withheld entry of judgment for sixty days,

however, to afford the President ample opportunity to make the determination provided for in the Amendment as to whether the application of the act of state doctrine was required in this case by the foreign policy interests of the United States. Pet. App. 106-07, J.A. 56a-57a, 243 F. Supp. at 981. In response to this opportunity, the Court received a letter, dated September 29, 1965, from the United States Attorney for the Southern District of New York stating that no such determination had been made, and "so that there will be no ambiguity, the Court is advised that no such determination is contemplated." Pet. App. 108, J.A. 58a, 272 F. Supp. at 837.

Thereafter, the District Court entered its judgment dismissing Petitioner's complaint. Pet. App. 111, J.A. 61a. The Court of Appeals affirmed on all issues and reiterated its prior holding that the expropriation decree violated international law.

Reasons for Denying the Writ

1. The Court of Appeals' resolution of the constitutional questions involved herein is, as conceded by the Government below,* in accord with and compelled by prior decisions of this Court. Thus, further review is unnecessary since it would not call for an exposition of any principles not already established, without any conflict of decisions.

Congress' constitutional authority to enact legislation of this kind, pursuant to its powers to regulate foreign com-

* While the United States, through the Department of Justice which appeared *amicus curiae* in the District Court, urged against the application of the Amendment to this case as a matter of statutory construction, it conceded that even as so applied it was "valid" and "constitutional." See Pet. App. 59, 383 F.2d at 183; Pet. App. 87, J.A. 37a, 243 F. Supp. at 971. The Government did not participate in the Court of Appeals.

merce (U.S. Const. Art. I § 8, cl. 3) and define and punish offenses against the Law of Nations (U.S. Const. Art. I § 8, cl. 10), is unquestionable. When this Court in *Sabbatino* held "the scope of the act of state doctrine must be determined according to federal law" (376 U.S. at 427), the first two authorities cited were the foreign commerce power and the power to define and punish. 376 U.S. at 427 n. 25. And, as *Sabbatino* also set forth, whether or not the act of state doctrine is applied in suits arising out of foreign confiscations may significantly affect foreign commerce and the "flow of international trade." 376 U.S. at 433. Despite the the indisputable power of Congress to legislate in this area, Petitioner asserts that the Amendment unconstitutionally infringes on the power of the Judicial and Executive branches.

(a) Petitioner bases its claim that the Amendment unconstitutionally invades the power of the Judiciary on its assertion that this Court has already decided that the validity of a taking by a foreign sovereign within its own territory "is not a subject for judicial determination." Petition, p. 8. But this is clearly a misinterpretation of the Court's *Sabbatino* decision. The Court there made it very clear that these issues are within the constitutional jurisdiction and competence of the courts.

> "The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state." 376 U.S. at 423.
>
> "This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law." 376 U.S. at 430 n. 34.

Seeking support for its erroneous assertion of non-justiciability, Petitioner attempts to find in this case the ele-

ments listed by the Court in *Baker* v. *Carr*, 369 U.S. 186 (1962), to describe a non-justiciable "political question." According to *Baker*, however, the political question doctrine is a facet of the constitutionally dictated separation of powers doctrine (369 U.S. at 210, 217) and involves the Court in a "delicate exercise in constitutional interpretation" in determining whether the matter in suit "has in any measure been committed by the Constitution to another branch of Government." *Id.* at 211. As we have shown above, *Sabbatino* thoroughly disposed of any contention that this case involves a non-justiciable political question in the constitutional sense. See Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 822 n. 57 (1964).

Moreover, contrary to Petitioner's contentions, the *Baker* elements are not presented here.* Regarding the first element, a constitutional commitment of the issue to a coordinate political branch, *Sabbatino* specifically recognized that although this case may bear upon foreign relations, that fact does not put it "beyond judicial cognizance." 376 U.S. at 423. As to the second element, Petitioner (p. 8), citing *Sabbatino*, asserts a "lack of judicially discoverable and manageable standards" for resolving the question of validity of Cuba's confiscation. This Court, however, stated that "we do not, of course, mean to say that there is no international standard in this area . . ." (376 U.S. at 429 n. 26) and did not in any way intimate that courts would be unable to

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* Significantly, the Court in *Baker* omitted act of state cases from its list of prior political question cases, even under the specific category head of "Foreign Relations."

"discover" and "manage" the standard if called upon to do so. See *The Paquete Habana;* 175 U.S. 677, 700 (1900). Certainly, the Court of Appeals was able to resolve these questions in this case, and, as conceded by Petitioner (p. 19), its finding of violation of international law was undisturbed by this Court. Additionally, the Amendment incorporates by express reference the standards of compensation to be applied. See Vaughter, Comment, 2 TEX. INT'L L. FORUM 107, 114-16 (1966).

Petitioner also seeks to wring four other elements from *Baker:* (1) that the validity of the Cuban confiscations cannot be decided "without an initial policy determination of a kind clearly for non-judicial discretion;" (2) that courts cannot resolve the issues "without expressing lack of respect due the Executive Branch;" (3) that necessity demands "adherence to a political decision already made;" and (4) that there is "great potentiality of embarrassment from multifarious pronouncements of various departments on one question." Petition, pp. 8-11. There are simple answers to these contentions. As to the first, Congress has already made the policy determination as it was clearly competent to do. As to the second, the Executive is not the sole guardian of international law in the United States. *E.g., The Paquete Habana, supra* at 700. As to the third and fourth, the proviso of the Amendment pays adequate deference to the role of the Executive in managing delicate international situations because it broadly authorizes the Executive to prevent adjudication if the foreign policy interests of the United States require it. The possibility of inter-branch conflict is therefore carefully removed by the design of the Amendment itself, inasmuch as it en-

sures — as in the case of sovereign immunity suggestions* — what the District Court aptly described as a "proper adjustment between the functions of the executive and judicial branches . . . , a result entirely consistent with the constitutional purpose." Pet. App. 98-99, J.A. 48a-49a, 243 F. Supp. at 977. Moreover, in this case, after ample opportunity for deliberation, the Executive made it clear that application of the act of state doctrine was not required by the foreign policy interests of the United States. See p. 4, *supra.*

Of course, Congress may not compel the courts to decide cases which are without their constitutional power to decide.** The act of state doctrine, however, was not compelled by the Constitution (*e.g.*, 376 U. S. at 427), but rather by an exercise of this Court's discretion in choosing among a number of constitutionally permissible alternatives. Pet. App. 55-56, 383 F.2d at 181. As said in *Yakus* v. *United States,* 321 U. S. 414, 442 (1944):

> "The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions."

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* In *Rich* v. *Naviera Vacuba, S.A.,* 197 F. Supp. 710 (E.D. Va.), *aff'd,* 295 F.2d 24 (4th Cir. 1961) (*per curiam*), upon which Petitioner relies so heavily, the Courts refused to adjudicate because sovereign immunity suggestions were filed on behalf of the Executive, without, it may be noted, the great embarrassment Petitioner foresees from employment of the comparable act of state suggestion procedure. See McDougal, *Act of State in Policy Perspective: The International Law of an International Economy,* in PRIVATE INVESTORS ABROAD — STRUCTURES AND SAFEGUARDS 327, 344 (1966). Even if the Amendment were law in 1961, sovereign immunity would still have presented a bar to suit. See *American Hawaiian Ventures, Inc.* v. *Latuharhary,* 257 F. Supp. 622, 626 (D.C.N.J. 1966).

** The cases cited by Petitioner (p. 7) merely contain hornbook statements of law to this effect.

Ultimately Petitioner's argument must rest on the untenable theory that Congress cannot direct a court to decide questions which, previously, in its discretion it had refused to decide, but which are within its constitutional competence to decide. The cases cited by both the Court below (Pet. App. 56 n. 17, 383 F.2d at 181 n. 17) and the District Court (Pet. App. 95, J.A. 45a, 243 F. Supp. at 975-76) amply demonstrate that courts have "changed their position due to intervening federal legislation and have decided issues which they had formerly refused to decide," and these cases are sufficient precedent for similar action here. Pet. App. 56, 383 F.2d at 181. We need only add what this Court said in its recent decision in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967):

> "[T]he question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative."

(b) Petitioner's challenge to the Amendment on the ground that it unconstitutionally invades the power of the Executive is likewise without merit. That foreign relations are not the exclusive province of the President is shown by *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302 (1918), where it is stated that the conduct of foreign relations "is committed by the Constitution to the Executive and Legislative" departments of government.* Moreover, as shown above, the Amendment is a valid exercise of congressional power under the commerce clause and the power to define and punish.

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* Similarly, *Chicago & S. Airlines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) and *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), are acknowledgments of congressional power in this area since, in both cases, the presidential action involved was authorized by and based upon an act of Congress.

Since Congress clearly has a constitutional interest in the issues involved, it is entitled to make its will known by statute. In *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423 (1899), the same objection raised here, that a matter was within the President's exclusive power over foreign relations, was disposed of by this Court as follows:

> "[T]he act . . . is not liable to the objection that it subjected to judicial determination a matter committed by the Constitution to the exclusive control of the President. The subject was one in which Congress had an interest, and in respect to which it could give directions by means of a legislative enactment." *Id.* at 459.

As noted by the District Court, Petitioner has been unable to point to any case, and we are unaware of any, where congressional action under the commerce clause affecting foreign affairs has been struck down as violating the doctrine of separation of powers. Pet. App. 91, J.A. 40a-41a, 243 F. Supp. at 973.

As to the contention that the presidential proviso is inadequate in that it does not provide the "flexibility" required by the Executive, we need only note that the flexibility involved seems to be either to invoke the act of state doctrine or not to invoke it. This choice is preserved and respected by the Amendment. See Folsom, *The Sabbatino Case: Rule of Law or Rule of "No Law"?*, 51 A.B.A.J. 725, 730 (1965). That the President, who must be presumed to know and be zealous to maintain the prerogatives of his office, signed the Amendment into law, coupled with the Justice Department's position that it is constitutional, provides compelling evidence that those prerogatives are not endangered.

(c) The sweeping statement that "constitutional due process questions raised by a retroactive statute are difficult and such statutes have generally been held invalid" (Petition, p. 18), is insufficient to present a substantial question in this case. *Lynch* v. *United States,* 292 U. S. 571 (1934) and *Forbes Pioneer Boat Line* v. *Board of Comm'rs,* 258 U. S. 338 (1922), which are the only two cases cited in the Petition holding retroactive legislation invalid,* and all other cases cited by Petitioner to the Court below, involve retroactive legislation destroying vested property rights or creating new liabilities. Pet. App. 52, 383 F.2d at 179. Here, Petitioner never acquired any vested or legally cognizable rights. Whatever "rights" it had arose by virtue of confiscation, and if the confiscation was unlawful, no right could attach as a result of it. See *Johannessen* v. *United States,* 225 U. S. 227, 242 (1912).

Additionally, the Amendment neither destroys any right, assuming one to exist, nor creates any new liability. By enacting the Amendment, Congress simply lifted a bar to the consideration of questions of substantive rights and liabilities. This is precisely what occurs when a legislature extends or repeals the period of limitations, and in such a case retroactivity does not present a constitutional problem (*e.g., Campbell* v. *Holt,* 115 U. S. 620 (1885)), even though the extension is applied to pending cases. *Chase Sec. Corp.* v. *Donaldson,* 325 U. S. 304 (1945).

2. The attempt to overturn the decision below on the ground that the Amendment does not apply retroactively to

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* *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297 (1937), and *Graham & Foster* v. *Goodcell,* 282 U. S. 409 (1931), both held the particular retroactive statutes there involved constitutional.

this case is also without merit. Statutes are applied retrospectively when they "clearly, by express language or necessary implication, indicate that the legislature intended a retroactive application." 2 SUTHERLAND, STATUTORY CONSTRUCTION §2201 at 115 (3d ed. 1943). Here, Congress has decreed that the Amendment be applied to all cases "in which a claim of title or other right to property is asserted by any party including a foreign state . . . based upon . . . a confiscation or other taking after January 1, 1959. . . ." Thus, the Amendment, by it terms, applies to claims based on past confiscations occurring between January 1, 1959 and the date of enactment, including the claim here involved.

The use of the January 1, 1959 date is itself significant. It marks the coming to power of the Castro regime, and there is no reasonable explanation for its use other than that it was intended to make the Amendment applicable to the Cuban confiscations.* There is not the slightest basis for inferring Congressional intent to discriminate among the victims of those confiscations by denying some of them the protection of the Amendment, depending, for example, on whether title based on these confiscations was acquired before or after adoption of the Amendment. See Petition, p. 16.

It is now firmly established, as correctly held by the Court below, "that when a statute specifically applies to past transactions, as the . . . Amendment does, it applies to pending causes too. . . . " Pet. App. 40, 383 F. 2d at 173. Petitioner attaches significance to the Court of Appeals' acknowledgment that the cases announcing this well known

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* ". . . January 1, 1959, is the date of the coming to power of the Castro regime in Cuba and the beginning of the greatest series of illegal takings of American property in recent history." 110 Cong. Rec. 19557 (1964) (memorandum of Senator Hickenlooper).

rule "differ from the present case in some particulars," one being a criminal case, others involving injunctive relief, or the effect of a new treaty or change in case law. However, Petitioner has never pointed to a "convincing reason why the rule should not be applied in this case where a statute has become law while the case has been pending." *Ibid.**

3. Whether this Court's mandate in *Sabbatino* precludes consideration of the Amendment on remand has no wider application than to the parties in this case and involves no question of general importance. The issue, which seems never to have arisen before in a federal court (Pet. App. 49, 383 F.2d at 178), stems from facts peculiar to *Sabbatino;* that federal legislation required consideration by the District Court, in the absence of a Presidential interposition, which might and did give rise to a different result in a case still pending, after Supreme Court decision leaving open certain further proceedings in the District Court.

Even considering the merits of the issue, there is no need for further review because the decision below was clearly correct. Without regard to whether the actual terms of the mandate permit application of the Amendment, the "mandate rule" is inapplicable to this case. It represents "the practice of courts generally to refuse to reopen what has been decided." *King* v. *West Virginia,* 216 U. S. 92, 100 (1910); see *Messenger* v. *Anderson,* 225

* Respondents are in accord with both the Court below (Pet. App. 41, 383 F.2d at 173) and the District Court (Pet. App. 73-74, J.A. 23a-24a, 243 F. Supp. at 964) that where a statute is as clear as this one there is no need to resort to legislative history. Nevertheless, both Courts did extensively examine the history and concluded that it supported retroactive application of the Amendment to this case. Pet. App. 47, 48, 383 F.2d at 177; Pet. App. 78, 83-84, J.A. 28a, 33a-34a, 243 F. Supp. at 966, 969.

U. S. 436 (1912). But, as the cases cited by the Court below show (Pet. App. 50, 383 F.2d at 178), the practice is inapplicable and is disregarded and a lower court is not bound to follow the mandate of an appellate court when the mandate is affected by a higher authority. Here, Congress has exercised its constitutional powers to formulate national policy regarding the disposition of international law questions coming within the purview of the Amendment. The mandate is thus not to be used to bar the exercise of constitutional powers, and the courts will and should accommodate their administrative practice to the congressional directive. Congress clearly has the power to "prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate." *Prima Paint Corp., supra* at 405.

4. Petitioner argues that this confiscation does not involve an international law issue because C.A.V. was organized under Cuban law. The cases allegedly supporting the proposition that place of incorporation is determinative (Petition, p. 13) are not even remotely in point, as they do not deal with the problem of whether or not an international law issue is presented.* "Over ninety per cent of

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* Thus, *Louisville, C. & C. R.R.* v. *Letson*, 43 U.S. (2 How.) 497 (1844), and *Puerto Rico* v. *Russell & Co.*, 288 U.S. 476 (1933), involved the issue of "citizenship" for the purpose of Federal diversity jurisdiction. *United States* v. *Northwestern Express Stage and Transportation Co.*, 164 U.S. 686 (1897), affirmed that corporations are citizens for the purpose of qualifying to present claims for property destroyed by Indian depredations, and *The Pedro*, 175 U.S. 354 (1899), recognized that the flag determines the vessel's nationality in prize cases. Similarly, *Behn Meyer & Co.* v. *Miller*, 266 U.S. 457 (1925), in which this Court's decision was simply a construction of a specific section of the Trading with the Enemy Act, and the *Standard Oil Tankers Case*, 22 Am. J. Int'l L. 404 (1928), in which the tribunal construed the Treaty of Versailles, do not involve the point at issue.

C.A.V.'s shareholders were United States nationals" (307 F.2d at 861), and the expropriation decree makes clear that its property was seized because of that fact. See p. 2, *supra*. In view of this the Court of Appeals rightly rejected Petitioner's formalistic argument.

> "When a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for us in passing on the validity of that treatment to look only at the 'nationality' of the corporate fiction." Pet. App. 64, 383 F.2d at 185; 307 F.2d 861.*

That disregard of the corporate entity is entirely proper under international practice is established by the authorities cited by the Court of Appeals (307 F.2d 861), such as the *Delagoa Bay Ry. Case,* [1902] For. Rel. U.S. 848 and *El Triunfo,* [1902] For. Rel. U.S. 859. In these arbitrations the United States interposed claims on behalf of American nationals as owners of foreign companies, which, as here, were exploited by the state of incorporation. The tribunals looked beyond the corporate entity and found international law issues involved. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 171 (1963), states:

> "International law only takes account of the real nationality of the physical persons covered by the legal fiction of corporate personality . . . . In other words, international law deliberately sacrifices the unitary conception of a legal personality which regards corporations as having a single nationality in

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* *Daniel* v. *Commissioners,* 2 Knapp's P.C. Rep. 23 (1825), and *Lang* v. *Commissioners,* 2 Knapp's P.C. Rep. 51 (1823), are inapplicable in that they involve construction of treaties, and are not applications of general international law. *Janson* v. *Dreifontein Consolidated Mines, Ltd.,* [1902] A.C. 484, is likewise not in point as the tribunal was not applying international law but the public policy of Great Britain.

order to look beyond the legal forms and to determine the interests and the parties actually suffering injury." (Footnotes omitted)

Petitioner eventually resorts to the argument that "endless mischief" would result from any rule other than the one it espouses. Petition, p. 14. These dire predictions seem merely to be props for advocacy; the problems are all subject to resolution within the judicial process and, as observed by the Court below, a ready standard exists in the Amendment itself.* Pet. App. 64, 383 F.2d 185.

5. The Court of Appeals' holding that the expropriation was unlawful was clearly correct and this question does not merit review. Cuba's action violated well established substantive norms of customary international law as well as the standards incorporated in the Amendment.

Our Brief to this Court in *Sabbatino* (pp. 44-49) and the Court of Appeals' first opinion herein (307 F.2d at 864-68) adequately set forth the authorities establishing that an expropriation, such as this one, unaccompanied by compensation and involving retaliation and discrimination against the nationals of one country violates international law. Petitioner's argument (p. 19) that this particular confiscation was neither retaliatory nor discriminatory is refuted on the face of the expropriation decree itself and has been continuously rejected below. See Pet. App. 60, 383 F.2d at 183; 307 F.2d at 864-68; 193 F. Supp. at 382-85. There is no need to repeat again the grounds for that rejection.

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* "The congressional standard requires full compensation for any taking of a corporation or other business association more than 50 per cent beneficially owned by United States citizens irrespective of the nominal nationality of the corporation." Pet. App. 64, 383 F.2d at 185.

Moreover, Cuba's failure to pay compensation* in and of itself was violative of international law. Petitioner asserts that no such standard exists,** but the municipal, international arbitral and judicial tribunals which have considered the problem are nearly unanimous in recognizing that international law does require compensation for the taking of alien owned property. The actual customs and usages of civilized nations demonstrate that almost all recognize the requirement of compensation. The position of the United States and other western capital exporting nations is undisputed. Capital importing or "underdeveloped countries" as well as socialist states have actually provided compensation upon expropriation of alien owned property and recognize the obligation in their treaties,*** internal laws and constitutions. The authorities have been fully discussed in our Brief in *Sabbatino* (pp. 35-44) and are also set forth in a recent report of The Committee on International Law of The Association of the Bar of the City of New York, *The Compensation Requirement in the Taking of Alien Property,* 22 N.Y.C.B.A. RECORD 195 (1967). The existence of a few vocal dissenters

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* "Although a system of compensation was formally provided, the possibility of payment under it may well be deemed illusory." 376 U.S. at 401-02.

** Petitioner can gain no comfort from the initial decision of the Court of Appeals or the decision of this Court. The Court of Appeals simply chose not to treat the compensation issue independently because the three combined elements were present (307 F.2d at 864), and this Court, as we pointed out, p. 6, *supra,* specifically stated that it was in no way denying the existence of a standard of international law.

*** Of particular interest is the treaty between Japan and Cuba, concluded in 1960, providing that "property of nationals and companies of either Party shall not be taken . . . without just compensation." Jennings, *The Sabbatino Controversy,* 20 N.Y.C.B.A. RECORD 81, 88 (1965).

cannot impair the validity of the general rule. *E.g.*, Jennings, *supra* at 86; Collinson, *Sabbatino: The Treatment of International Law in United States Courts*, 3 COLUM. J. TRANSNAT'L L. 27, 43 (1964); Cetti, *Sabbatino and the Act of State Doctrine*, 16 MERCER L. REV. 331 (1964).

Cuba's confiscation of C.A.V.'s property also violates the compensation standards incorporated in the Amendment in that it failed to provide any compensation at all. Petitioner attempts to negate the existence of these standards by arguing that Congress in the Amendment intended that international law be applied, that Congress cannot make international law, and that these standards are not in accord with substantive rules of international law. This argument is obviously self defeating, for when Congress enacted these standards it clearly intended they be applied in appropriate cases.*

While it is, of course, true that Congress cannot enact international law in the sense that courts of other nations will be bound to apply it, Congress can, as it did here, pursuant to its power to define and punish offenses against

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* If Congress had intended that these standards not be applied unless found consistent with customary international law, there would have been no reason to refer to them since the Amendment itself requires courts to give effect to the principles of international law. Moreover, one of the Amendment's main purposes was "to protect U. S. investment" throughout the world (110 Cong. Rec. 19559 (1964) (remarks of Senator Hickenlooper)), a purpose which surely would not be served if Petitioner's arguments are correct. The standards are intended to "spell out" the requirements of the traditional standard of prompt, adequate and effective compensation which our country has long espoused. 110 Cong. Rec. 24076 (1964) (extension of remarks of Senator Hickenlooper); 110 Cong. Rec. 23680 (1964) (remarks of Congressman Adair).

the law of nations, specify the rules of international law to be applied by United States courts. *Banco Nacional de Cuba* v. *First Nat'l City Bank,* 270 F. Supp. 1004, 1008 (S.D.N.Y. 1967). "The most certain guide, no doubt, for the decision of . . . [international law] questions is a . . . statute of this country." *Hilton* v. *Guyot,* 159 U.S. 113, 163 (1895); see *The Paquete Habana,* 175 U.S. 677, 700 (1900). Even if applicable principles of international law were doubtful (as they are not here), the congressional direction would represent the supreme law of the land and must be followed. See *The Paquete Habana, supra* at 700; *Hilton* v. *Guyot, supra* at 163. International law "like all common or statute law . . . bends to the will of Congress." *The Over the Top,* 5 F.2d 838, 842 (D.C. Conn. 1925).

6. As the Court of Appeals observed, municipal courts are certainly competent to decree restitution and there is question whether the matter of the remedy is a feature of municipal or international law. 307 F.2d at 868. Even assuming as Petitioner does, however, that the remedy is solely a question of international law, there can be no doubt that international tribunals, and hence domestic courts applying international law, are competent to decree restitution. *E.g., Chorzow Factory,* P.C.I.J., ser. A, No. 17 at 4, 47-48 (1928) (*dictum*); *Portuguese Religious Properties Case* (France, Great Britain and Spain v. Portugal), 1 U.N. Rep. Int'l Arb. Awards 7 (Perm. Ct. Arb. 1920); Jennings, *supra* at 85; Cheng, *The Rationale of Compensation for Expropriation,* 44 TRANSACT. GROT. SOC'Y 267, 291-92 (1959). In any event, in this case, involving only the proceeds of sale of the sugar, "damages" and "restitution" are identical.

CONCLUSION

The decision below is clearly correct. This Court has settled the proper role of the "act of state" doctrine and the decision below does not impinge upon it. There is no conflict of decisions. The case, in its present posture, involves no questions of general importance, requiring review. The Petition should, therefore, be denied.

Respectfully submitted,

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